TEO AH BIN

v.

TAN KHENG GUAN

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-193-1997(1)]
31 JANUARY 2002

TRUSTS: *Express trust - Creation - Whether there was clear intention to create a trust - Whether conduct of plaintiff proved otherwise - Whether plaintiff estopped by conduct from claiming beneficial interest in land*

LIMITATION: *Contract - Action based on contract - Failure to institute action within six years - Whether statute-barred - Limitation Act 1953, s. 6(1)(a)*

This was a claim by the plaintiff that the defendant, as a result of three agreements between the two of them, held 4/10 of the undivided share in the land known as grant no. 26627 lot 5128 ('the land') on trust for the plaintiff, and that the defendant execute all necessary documents to effectuate the transfer thereof. The issue that required determination was whether an express trust in favour of the plaintiff had been created by the terms of the agreements aforesaid in respect of the 4/10 undivided share in the land.

Held:

[1] For a trust to be created, there must be a clear intention to create a trust – the usage of the word "trust" *per se* in the absence of other factors was insufficient; the plaintiff's conduct showed an assertion as a creditor and not beneficiary of a trust. Furthermore, the initiation by the plaintiff of an action for specific performance was clearly inconsistent with a claim for a declaration of trust and established the election by the plaintiff as to specific performance, resulting in estoppel by election against a trust. (pp 210 e-f & 211 h)

[2] The nature of the plaintiff's claim herein was based on a contract for money advanced and not on trust, resulting, constructive or otherwise; hence, limitation would invariably set in if no claim was instituted within six years under s. 6(1)(a) of the Limitation Act 1953. Therefore, the failure by the plaintiff to institute action within six years resulted in the claim being statute-barred. (p 212 a-b)

[Claim dismissed.]

Case(s) referred to:
Hill (Viscount) v. Hill (Dowager Viscountess) [1987] QB 483 ***(refd)***
Leong Cheong Kweng Mines Ltd v. Kok Hoong [1962] 28 MLJ 224 ***(foll)***
Letchumanan Chettiar v. Palaniappa Chettiar [1983] 1 MLJ 6 ***(refd)***
Liew Choy Hung v. Fork Kian Seng [2000] 1 CLJ 369 ***(refd)***
Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene [1995] 1 MLJ 115 ***(refd)***
Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd. [1985] 1 MLJ 7 ***(refd)***
Ord v. Ord [1923] 2 KB 433 ***(refd)***
Re Teppers Will Trusts Kramer & Anor [1987] Ch 358 ***(dist)***
Registrar of Titles, Johor v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***
Yap Joyce v. Tee Molly & Anor [2000] 6 CLJ 220 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a), 22

Other source(s) referred to:
Equity & the Law of Trust, 7th edn, p 129
Sarkar's Law of Evidence, 13th edn, at p 1157
Underhill & Hayton, *Law Relating to Trusts and Trustees*, 14th edn, p 190

For the plaintiff - S Sagadeva; M/s Saga & Kumar
For the defendant - Badrol Hisham Mohd Sani; M/s Zainal & Badrol

Reported by Suresh Nathan

JUDGMENT

Syed Ahmad Helmy JC:
The plaintiff's claim herein is for declaratory reliefs that the defendant holds 4/10th of the undivided share in the land known as Grant No. 26627 Lot 5128 on trust for the plaintiff and the defendant execute all necessary documents to effectuate the transfer. The material facts in the action herein are as follows:

Sometime in January 1973 the defendant represented to plaintiff that he had an option to purchase 52 acres of land in Johor belonging to a church and approached the plaintiff. Based on the representation the plaintiff paid 10% on behalf of defendant to exercise the option. The defendant was unable to come up with his portion and hence an agreement dated 20 January 1973 (hereinafter referred to as the first agreement) was entered wherein plaintiff was to provide all financial resources to secure the purchase – it was a term of the agreement that plaintiff would be entitled to 11/20th and defendant 9/20th undivided shares in the land.

The defendant was unable to come up with the funds (RM125,033.91) to purchase his 9/20th share and hence by virtue of cl. 2 thereof pending payment he confirms and declares holding the 9/20th undivided shares in trust for the plaintiff.

Later, on 25 February 1973 (hereinafter called the second agreement) another agreement was entered into whereby defendant agreed to reduce his shareholding to a 4/10th share by reason of plaintiff's further payment of the earnest monies.

As the defendant again failed to come up with the payment for his share, another agreement dated 27 February 1974 (hereinafter called the third agreement) was entered into whereby the property's sale price was fixed at RM1 million and the parties were given option to purchase the other's share within 30 days, the defendant being given the first right to exercise the option. There was a similar declaration by the defendant that he holds the 4/10th of the undivided shares on trust for the plaintiff until the sum of RM125,033.91 is fully settled by the defendant.

The defendant having failed to exercise the option the plaintiff thereupon exercised the option and forwarded the sum of RM40,000 to defendant's solicitors Messrs. Allen & Gledhill. The defendant refused to honour the agreement and returned the RM40,000.

Against the background aforesaid the plaintiff initiated action in Civil Suit No. 214-74 claiming specific performance of the third agreement.

The plaintiff obtained default judgment which was subsequently set aside by the High Court and upheld by the Court of Appeal. The Court of Appeal directed that the writ be reserved but owing to the failure of the plaintiff to reserve, the writ expired and no further action was taken by the plaintiff. The High Court in setting aside the default judgment also ordered that the Registrar of Titles, Johor do enter a registrar's caveat on the 4/10th of the undivided shares in the said land.

The defendant instituted an *ex parte* action in Saman Pemula No. 24-1070-1996 and obtained an order to set aside the registrar's caveat lodged on the land and for a declaration that he is the beneficial owner.

The plaintiff filed in an application to intervene and the High Court allowed the plaintiff to intervene but refused to set aside the declaratory order as to the defendants beneficial ownership over the land obtained *ex parte*. Upon appeal, the Court of Appeal set aside the declaratory order on the ground that the High Court had no power to grant the declaration sought on an *ex parte* basis but it would appear the Court of Appeal did not go into the merits as to the question of beneficial ownership.

In the light of the Court of Appeal decision the parties herein proceeded with the present application for adjudication on its merits.

The issue for determination in this action is whether an express trust in favour of plaintiff has been created by the terms of the agreements aforesaid in respect of the 4/10th undivided share in the subject property known as Lot 5128.

The plaintiff's claim that the undivided 4/10th share is held in trust by defendant is based on the first agreement dated 20 January 1973 entered into between the parties whereby by cl. 2 thereof the defendant confirms and declares that he holds the said undivided shares on trust for the benefit of the plaintiff and subsequently through re-apportionment of the shares it was reiterated in the third agreement dated 27 February 1974.

The determination of the issue herein would invariably involve a consideration of the background history as related above and the appraisal of all three agreements cumulatively and not in isolation.

Plaintiff contends that by reason of cl. 3 of the third agreement dated 27 February 1974 there was an express declaration of trust and relies on the English case of *Hill (Viscount) v. Hill (Dowager Viscountess)* [1987] QB 483 as proposition that the usage of the term trust would establish the creation of a trust. In that case Chitty LJ stated at p. 493:

> A trust undoubtedly may be created by any apt words, but the circumstances that the well understood and obvious term "trust" is not used seems to me to be worthy of some consideration where the question is whether a trust is or is not intended to be created.

The plaintiff also referred to the case of *Yap Joyce v. Tee Molly & Anor* [2000] 6 CLJ 220 in relation to the pre-requisite of certainty of words, subject matter and object matter in the establishment of a trust and contends that the reference to "4/10th undivided share" provides certainty of subject matter; the reference to the plaintiff provides certainty as to the object matter and the usage of the word "trust" provides certainty as to the intention to create a trust.

The plaintiff further contends that a trust can be subjected to some condition precedent or condition subsequent and relies on the case of *Re Teppers Will Trusts Kramer & Anor* [1987] Ch 358 and by reason thereof the condition relating to the payment of RM125,033.91 by the defendant & the exercise of the option to purchase the defendant's 4/10 undivided share by the plaintiff are conditions subsequent to the creation of the trust, which conditions will terminate the beneficial interest of the plaintiff upon the defendant repaying the sum of RM125,033.91.

By reason of the express trust created aforesaid the plaintiff concludes that its claim is not barred by limitation under s. 22 of the Limitation Act 1953.

Alternatively the plaintiff contends that there is a resulting trust arising by reason of the plaintiff's payment of the purchase price of the property – *Liew Choy Hung v. Fork Kian Seng* [2000] 1 CLJ 369 or constructive trust as it was the parties common intention that the undivided share is to be held on trust and the plaintiff in contributing 100% of purchase price had suffered detriment and has performed all his obligations under the third agreement – *Registrar of Titles, Johor v. Temenggong Securities Ltd* [1976] 2 MLJ 44.

The defendant on the contrary submits that the factual matrix clearly established that the transaction was one of loan advanced to the defendant by the plaintiff to assist the defendant to purchase his apportionment of the undivided share in the land.

In support of his contention the defendant relied on the two earlier actions, namely Civil Suit 214/74 and 24-1070-96 and also the statutory declaration of the plaintiff in support of the entry of a private caveat in February 1977 to show that there was no assertion nor claim for beneficial interest over the undivided share. The plaintiff's own conduct as demonstrated by the earlier action clearly shows that he had no claims over the undivided share registered in defendant's name other than the moneys advanced and that the defendant's undivided share would constitute repayment of the loan and nothing more.

I have carefully perused the available evidence and the written submissions of learned counsels for both the plaintiff and defendant and it is my considered view that for a trust to be created there must be clear intention to create a trust – the usage of the word "trust" *per se* in the absence of other factors is insufficient to create a trust. On the contrary the conduct of the plaintiff up till 1997 without doubt shows an assertion as a creditor and not beneficiary of a trust. The conduct aforesaid together with the admission on oath through the statutory declaration that the defendant was the owner of the 4/10th undivided share as against the defendant's valuable consideration in bringing the business opportunity for the purchase of the land to the plaintiff and the plaintiff's own acknowledgment that it was fair for the defendant to receive some benefit and the status of the defendant as debtor in the borrowing of the sum of RM125,033.91 and expressly accepting a restriction against sale by himself until the debt is repaid all goes to show conclusively that there was never an intention to create a trust.

Underhill & Hayton in the *Law Relating to Trusts and Trustees* (14th edn) at p. 190 states:

> If payment is made at the request of and by way of loan to a person in whose name the property vested, there will be no resulting trust, because in such circumstances the lender did not advance the purchase money as purchaser but merely as lender.

Similarly in *Equity & the Law of Trust* (7th edn) at p. 129 the learned author commented:

> Evidence must also show that the money was intended to be advanced by the person alleging the resulting trust in the character of purchaser: if the evidence merely established a loan of some or all the money used for the purchase there will be no resulting trust and the person lending the money would be a mere creditor.

As I have found above the plaintiff's conduct proved conclusively that he had granted a loan to the defendant. Hence the plaintiff is estopped by his conduct from claiming otherwise or claiming that he has a beneficial interest over the lands. Thomson CJ in *Leong Cheong Kweng Mines Ltd v. Kok Hoong* [1962] 28 MLJ 224 at 227 quoting *Ord v. Ord* [1923] 2 KB 433 stated:

> An estoppel therefore is an admission or something which the law treats as equivalent to an admission, an extremely high and conclusive nature - so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to contradict it – Also see s. 115 of Evidence Act.

The conduct of the plaintiff in initiating action for specific performance in Civil Suit 214-74 clearly establishes an election on his part not to insist on a trust and by such election, estoppel by election applies.

In *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd.* [1985] 1 MLJ 7, the Privy Council held that the vendor had altered its position to its detriment by raising and paying $297,500. The essential requirement of estoppel by election was satisfied.

In short the plaintiff herein after approbating the contract through specific performance cannot reprobate it and aver against it or offer evidence to contradict it through the assertion of a trust. That is the very essence of estoppel by election. As the learned author of *Sarkar's Law of Evidence* (13th edn) at p. 1157 in commenting on estoppel by conduct stated:

> A party cannot be allowed to approbate and reprobate in the same transaction. They cannot vary a case set up in the lower court ... .

The initiation of the action for specific performance is clearly inconsistent with a claim for declaration of trust and establishes the election by the plaintiff as to specific performance which election results in estoppel by election against a trust.

Though trust is not caught within the ambit of the Limitation Act 1953 nevertheless as I have stated above there must be clear evidence of trust – *Letchumanan Chettiar v. Palaniappa Chettiar* [1983] 1 MLJ 6; *Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene* [1995] 1 MLJ 115 and the factual matrix herein negatives such evidence.

The nature of the plaintiff's claim herein is undoubtedly based on a contract for money advanced and not a trust, resulting, constructive or otherwise as the conduct of the plaintiff negatives one and hence by reason of the contractual nature limitation would invariably set in if no claim is instituted within six years under s. 6(1)(a) Limitation Act 1953. The failure by the plaintiff to institute action within six years has resulted in the claim being statute-barred.

There is also delay on the part of plaintiff to seek relief more so when looked against the perspective of the first action for specific performance initiated in 1974 and the subsequent action which was initiated in 1996 and 1997. The principle that delay defeats equities or equity aids the vigilant and not the indolent has to be applied vigorously against the plaintiff.

The plaintiff's reliance on *Tepper*'s case is distinguishable – the condition subsequent therein was considered in the context of a bequest in a will – here it relates to a contract. In *Tepper*'s case there was one fund in respect of which the condition subsequent was to apply – here there are two holdings as borne out by the third agreement – the plaintiff's 6/10th shareholding and defendant's 4/10th shareholding and mutual options granted over the other's shareholdings.

For the reasons adumbrated above I accordingly dismiss the plaintiff's claim with costs.